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HOW THE STUDY OF THE LAW BECOMES A PASSION OF THE SOUL.

Law cannot be taught, it must be studied; it cannot be imparted, it must be acquired; it cannot be exhibited, it must be lived. The teacher can lend his aid and lend it gladly, but the student must achieve the law alone. The lawyer is not a passively acquiescent recipient and spectator, he is an actively questioning producer and participant. For the law is not merely a subject-matter, to be tossed about like confetti, but is a discipline, a passion and a consecration.

Though we say that the law is "not *merely* a subject-matter," we do not mean to belittle that subject-matter. Far from it. The body of the law is tremendous in its extent and ramifications. There is no other subject that is as varied, as inclusive, as vitally important as the *corpus juris*. It touches each of us and all of us, all of the time. From the moment we are quick in our mothers' womb until the time a friend draws a sheet reverently over our face, the law touches and holds us and constrains us to its will.

We cannot speak our thoughts, nor write them, if they be to the hurt of another; we cannot dispose of our property, nor receive the property of another, nor enjoy the fruits of our labors, and the results of our toil, without the aid and sanction of the law. Whether one is lowly or of high degree the law curbs and constrains him. It is no respecter of persons. When a king of England appealed to his Divine Right as a king, and said he ruled under the sole suzerainty of God, he was told by the judges, in no uncertain terms, that he ruled *"sub Deo et sub lege."* Chimney-sweep or emperor, it is all one to the law.

Not only individuals but social and political institutions are under the law. Home, state and nation; all practical applications of science, art, religion, business and education, are governed and controlled by the legal order. We cannot get married nor raise a family, nor educate our children nor give them religious instruction or corporal punishment; we cannot perform a chemical experiment nor paint a picture nor read a poem; we cannot build a ditch, nor dig a well, nor erect a house, nor tear down a fence; we cannot go on a journey, nor sleep or eat on boat or train; we cannot aid a fellowman in suffering nor save a city from pestilence or fire; we cannot enter into business or retire to private life, without the sanction and aid of the law. It is all-embracive, all-pervading, all-overshadowing. In it we live and move and have our being. The subject-matter of the law is not to be belittled.

Yet, we repeat, the study of the law is not merely a study of a subject-matter. For the law is a discipline. It is the sharpening of one's mother-wit. It is the awakening of faculties dormant and unused. It is the creation and development of capacities that were non-existent before. It is the strengthening of powers of discrimination; the refining of logical distinctions; the discernment of likenesses and differences; the utilization of mental processes with clarity and poise; the development of judgment, and the acquisition of a sane and healthy standard for the solution of vital problems. It is clear, straight, hard thinking. It is wrestling with problems that cannot be solved by wishing. It is tackling difficulties that will not vanish at a mere bidding. It is encountering obstacles that are real, ponderable, mighty, that call into play every mental power, every physical endurance, every moral capacity you may have. It is an unending process, a ceaseless growth, a dynamic development of mind and soul. The study of law is a discipline.

As one develops his mental keenness by struggling with the subject-matter of the law, there is engendered in his spirit a passion for the law which is comparable to the artist's love of color and the musician's joy in sweet harmonies. This love for the law drives us to greater and deeper researches. It possesses us every waking moment. It causes us to grudge the time we must give to sleep. Social relations lose their flavor and are looked upon as mere distractions, while acquaintances are ignored, friends are neglected and loved ones are driven to distraction for fear that we are overtaxing our strength and undermining our health. Yet the law drives us on and we glory in its relentless urge. As one's comprehension of it deepens the beauty and majesty of the law enthralls him, and he yearns to become more and more a part of that glowing structure of beauty and life. No point is too trivial for careful consideration, no rule is so obvious that it can be ignored, no principle is so familiar that it can be passed with a bare nod of recognition, no standard so trite that we do not examine it anew with ever-increasing delight. The parts of the law which have outlived their usefulness we treat with dignity and respect, and we consider with deference those sections of the law which, through historic accident or through the blindness of men who barter wisdom for folly and justice for expediency, remain as blemishes upon and mar the beauty of the subject we love, even while we take thought how best these blemishes may be removed. The law kindles in the souls of its devotees a deep, abiding passion that makes light of work, mocks at arduous effort, and ever drives on to greater exertion and achievement.

But this passion, which grows at first out of personal joy, soon ceases to be a selfish passion. As one's insight grows he sees that the law is a method of social control; that it is the instrument by which organized society tries to make concrete the yearnings of the human soul for justice and righteousness in the practical affairs of life; that it is a functional discipline; that it has as its purpose disinterested service to mankind. That is why it is so human, so touched with the weals and woes of society. It is a part of, and grows out of the history of humanity; it is a human structure; it deals with human needs and aims at the satisfaction of human desires. The reported cases are not merely laboratory materials like so many chemical compounds, they are the records of human suffering and strife. Statutes are not simply expressions of opinion or fiats of will, they are the outgrowth of the ambitions of men and the fears of society. Text books are not only compendiums of information, they are the efforts of lovers of law to shape the law more nearly to the needs of the times. The law is built out of men's lives and is held together by the soul of humanity.

ALBERT LEVITT.

NOTES OF IMPORTANT DECISIONS.

CAN FORFEITED LIQUORS BE USED IN EVIDENCE AFTER SEIZURE WITHOUT PROCESS?—The rule of Silverthorn's Case (251 U. S. 385, 40 Sup. Ct. 182) that the unlawful seizure of defendant papers and property prevents their subsequent use as evidence, does not seem to apply to the case of the unlawful seizure of whisky and an automobile in which the whisky was being unlawfully transported. United States v. Fenton, 268 Fed. 221. In this case United States District Judge Bourquin (D. Mont.) held that intoxicating liquors and the automobile in which they are being unlawfully transported are already forfeited to the United States, so that the forcible seizure of such property without process by officers of the United States, even if irregular, was not a seizure of the property of defendants, and did not violate Const. Amends. 4 and 5, so that the whisky and automobile so seized were competent evidence against accused, notwithstanding a motion for return of the property.

In this case it appeared from the evidence that the arrest and seizure were about 75 miles south of the boundary line; that the officers had heard that several unnamed persons and autos were that night coming with whisky smuggled from Canada; that to capture them they located themselves 20 yards apart along the road; that about 3:30 a. m. defendants' auto slowly approached from the north; that the officer nearest turned a flashlight upon them and ordered them to halt, which they refused to do; that so likewise ordered the second and third officer, as defendants reached and passed them; that when the auto was a length or so past the first officer he fired to puncture the tires; that when it was about 10 feet past the third officer he overtook it, mounted the running board, and was ordered off by defendants with gun display; that the officers, with display of weapons, forced defendants to stop, arrested them, searched, found the whisky, some of which was visible before search, in part of Canadian brand, and seized auto and whisky.

The state contended that this should be regarded as an offense committed on the presence of the officers, or at least that there were grounds of suspicion considering all the circumstances. But the Court declared that it made no difference whether the arrest was legal or illegal, as far as the use of the whisky and automobile as evidence was concerned since under the Volstead Act this whisky and the automobile were already the property of the United States having been forfeited by the illegal transaction in which they were engaged. On this point the Court said:

"An unlawful arrest of an offender does not work a pardon in his behalf, and seizure without process and by force of government property, of which it is entitled to immediate possession, does not entitle the offender to a return of the property, nor to exclusion of its use in evidence against him. The auto and whisky, by virtue of the National Prohibition Act (41 Stat. 305), were forfeited, and thereby transferred to the United States, the moment defendants embarked upon the unlawful transportation. The United States was then vested with the right of property and possession. Even as any other owner of property in like circumstances at common law, the United States without process could recover possession by force. And, however, if at all, irregularly the officers proceeded, the defendants have no right to return of the property, nor to object to its use in evidence, whatever other, if any, right or remedy they may have. See U. S. v. Stowell, 133 U. S. 16, 10 Sup. Ct. 244, 33 L. Ed. 555, and cases; Taylor v. U. S., 3 How. 205, 11 L. Ed. 559; Boyd v. U. S. 116 U. S. 623, 6 Sup. Ct. 524, 29 L. Ed. 746."

THE POWER OF CONGRESS TO ESTABLISH PEACE.*

The power of Congress to establish peace by joint resolution as a corollary to its power to declare war has become of great practical importance by its recent proposed exercise consequent upon the Senate rejection of the Treaty of Versailles. Hitherto it had hardly reached the stage of academic discussion, doubtless because the need for its assertion had never reached the dimensions of a remote probability. But we live in unusual times, and nations are confronted with problems of novel and complicated character which cannot be evaded, whose solutions are unavoidable and whose gravity tests the capacity of modern statesmanship. Among them is the authority of the Legislative Department over foreign affairs.

Ours being a government of delegated powers operating under and controlled by a written constitution, the gravity of any affirmative solution of such a question as this lies in the precedent it establishes. We cannot foresee all that is beneath the horizon of the future, nor how or when or what we do today may protect or plague us hereafter. Hence the need of calm and dispassionate consideration of the assertion of new or the revival of moribund prerogatives, whether executive or legislative, before they be finally or formally recognized or applied. The instant situation, however grave, cannot be more so than the remoter crises sure to unfold themselves as the years go by.

The need for such exhaustive and careful preliminary inquiry is emphasized whenever the problem involves a collision between Congress and the Executive. For ours is a government wherein these two great departments may be and frequently are, mutually antagonistic; a condition always unfortunate and sometimes deplor-

*This careful discussion by Senator Thomas of Colorado of a constitutional question which is likely to assume great importance will be found interesting to lawyers of all shades of political belief.—Ed.

able. The nation has not yet fully recovered from the collisions of Congress with President Johnson's administration, nor has it benefited at all from the discordance of the last eighteen months, and due to the same causes. In no other great nation can these disturbed relations arise. Elsewhere the government must be in harmony with the legislative majority or it cannot survive. This may not be the better method but it tends to unity, prevents governmental dissension and minimizes the extent of a mistaken public policy. The governing forces must pull in one direction or they cannot pull at all. Under our system these forces may pull in different or even in opposite directions until the next presidential election. Even then the same conditions may be continued as the electorate may determine; hence to accentuate such a tendency is to weaken the efficiency, if not the security, of popular government. On the other hand, consequences should not deter us from meeting and solving new complexities as they confront us. To evade or to compromise with them is the more dangerous course, for that is to invite possible disaster. Indeed, it may be freely asserted that our proneness to postpone or temporize with unpleasant or difficult problems of social and economic concern, is the fruitful source of many, if not most of our internal difficulties.

Inquiry into the past furnishes but little information upon the subject under discussion. Those familiar with the meager journals of the Constitutional Convention need hardly be told that the war clause of the Constitution as originally reported to the committee of the whole, invested Congress with the power to "make" war, that the word 'make" was criticized because it was broad enough to include not only the declaration but the waging of war. Hence it was stricken out, and the word "declare" was substituted for it, thus imposing in some measure a distinct limitation upon congressional authority over the subject. Thereafter it was moved to further amend the clause by an additional phrase whereby Congress would have "power to declare war and to make peace;" thus expressly clothing the Legislative Department with authority to begin and to end war. Mr. Ellsworth, of Connecticut, in challenging this amendment, is reported to have said:

"There is a material difference between the cases of making war and making peace. It should be more easy to get out of war than into it. War also is a simple and overt declaration, peace attended with intricate and secret negotiation."

With apparently the briefest discussion, the proposed amendment was rejected unanimously. So far, then, as the record goes, it sustains the direct, if not the sole conclusion that the peace-making power required express action to impose it upon the Congress, and the effort to do this having failed, that power was lodged elsewhere. It should be found, therefore, either in the essential prerogatives of the Executive or in the treaty-making power under which the President negotiates treaties and the Senate ratifies or rejects them; a power which in Mr. Hamilton's opinion, was designed to be most ample and "competent to all the stipulations which the exigencies of national affairs might require."

Among all constitutional writers, Mr. Justice Story alone seems to have commented upon this feature of the organic law, and so briefly as to assume that his conclusion was self-evident. He says:

"This (the proposed amendment) was unanimously rejected upon the plain ground that it more properly belonged to the treaty-making power. The experience of Congress under the Confederation of the difficulties attendant upon vesting the treaty-making power in a large legislative body was too deeply felt to justify the hazard of another experiment."

It seems clear, therefore, that if legislative authority to make peace exists, it must be found elsewhere than in the power to declare war. It must proceed either from the general welfare clause of the Con-

stitution, or from the implications which attend all specific grants of authority. This opens a wide field of inquiry with fewer guides for the investigator than one might well expect. Fortunately, however, the pathway is not hopelessly indistinct.

A preliminary observation of a practical character may be here appropriate. A Congress hostile to the Administration, elected during the progress of a war duly and constitutionally declared, might, if it possessed the power, make peace with the enemy over the protest or against the opposition of the Commander-in-Chief and upon terms wholly inconsistent with the national honor and safety. Such a catastrophe is almost unthinkable; yet in 1862, opponents of the Civil War came dangerously near securing control of Congress upon an avowed determination to bring the war to a close, not by declaring peace so much as by pursuing a policy of obstruction in which adverse legislation and the withholding of supplies might effectuate the object. Any Congress can, of course, paralyze the prosecution of war by denying needful appropriations, but that would be to end war not by declaring peace, but by insuring the triumph of the nation's enemy. Not Congress, but the foe would dictate the terms of any peace induced by such tactics. It requires some effort of the imagination to conclude that although expressly denying to Congress the power to make peace, the framers of the Constitution, nevertheless, clothed it by implication with that prerogative.

This thought finds confirmation in the fact heretofore recited that the Constitution restricts Congress to the power of declaring war only, and not of waging it. The President is *virtute officii* the Commander-in-Chief of the Army and Navy, and as such must prosecute and direct all wars whether offensive or defensive. The devolution of even partial control elsewhere would be wholly inconsistent with, and in derogation of, his supreme powers of command. These powers must be lodged somewhere and in their entirety. They must rest upon a single individual if they are to be effective. They were wisely bestowed upon the Chief Executive, whose exercise of them must be untrammelled by outside interference; else the nation may be compromised or worsted. Legislative power to make peace wherever a legislative majority might so determine, cannot consist with exclusive executive power to wage war. Such a power through propaganda, political acrimonies or, indeed, honest and sincere divergencies of opinion, might produce a schism between the two departments at a time when unity was the supreme essential to the national existence. The friends of Nivelle declare that his great offensive of 1917 failed because powerful members of the Constituent Assembly interfered with the execution of his plans. Let us be slow, therefore, to assert or to admit the existence of this power until all its possible consequences are fully realized.

But it is contended that the power which can declare war is, and must be, the power to make peace. Hence Congress possessing the one, necessarily possesses the other. This may be true as a general proposition. Indeed, it is true of autocracy and of some limited monarchies. These powers are prerogatives of the Crown, unless limited by law. And were our Constitution silent upon the subject, I think there can be no doubt but that the Executive would be invested with them *eo ipso*. But it is not silent. It divides them in some degree. Neither is the exclusive depositary of them. Congress may declare war subject to executive approval, the President may negotiate peace subject to subsequent concurrence of two-thirds of the Senate.

We are accustomed to the arbitrary dogmatism that Congress alone has power to declare war; but the statement is not strictly true. Congress has power to declare war, just as it has power to lay and collect taxes, to borrow money, to regulate commerce, or to establish postoffices and post roads. Sec. 8 of Article 1 declares that "the Congress

shall have power" to do eighteen distinctive things which include many sub-heads of legislation. The eleventh of these is the power to declare war, etc. The concluding clause of Sec. 7 of the same Article provides that "Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States, and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be re-passed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill."

It follows that this, like all other powers conferred on Congress by Sec. 8 must, when exercised, be submitted for executive approval, and if that be denied, must thereafter command two-thirds of the membership of both houses before it can become effective. The war power of Congress is, in other words, identical in the procedure of its exercise with all its other powers of legislation, and is exclusive only in the sense that they are exclusive. Even, therefore, if the power includes that of making peace, its exercise is subject to Presidential approval; and if that be withheld, then to the ensuing two-thirds vote. And this presents the query whether having passed a resolution declaring war duly approved by the Executive, the Congress can repeal the resolution by the same processes. I think this proposition is too plain for argument. Congress can undoubtedly repeal any law or joint resolution it has enacted, and upon any subject within the range of its legislative power. The consequences of such a course would probably be deplorable; certainly most embarrassing, but consequences cannot, when the authority is obvious, in any wise limit or effect anything more than the expediency of its exercise.

It is a curious fact in our history that the Congress has not up to this time formally declared war against any foreign power. It has always recited acts of war previously committed by the offending power against the United States, whereby a state of war thus created is declared to exist between such power and the United States. The distinction between this recital and a formal declaration of war may not be very important, although it necessarily presupposes that war has come to us because of foreign aggression which is recognized although not declared against us; which exists not as flowing from our declaration, but from preceding hostilities of the enemy.

But would the repeal of such a resolution or a resolution declaring war, result in peace with the opposing belligerent? Certainly not, unless he accepted the repeal as terminating hostilities. His action is indispensable to that result. And this tremendously important fact, in my opinion, marks the boundary line of legislative authority over the subject; because it indicates the non-legislative character of peace proceedings. They are contractual. It is an old saying that one man can start a fight but two men are required to end it. If the one knocks out the other, or if one nation vanquishes the other, the victor may make his own terms, but even then as to belligerents, they are imposed by negotiation. A declaration of war is *ex parte*, and requires but an overt act. A return to peace requires the assent of both sides; in other words, it is reached by treaty unless both antagonists weary of the struggle and mutually abandon hostilities. If, therefore, the Congress should repeal its declaration of war, existing differences and resulting liabilities would remain for adjustment. These the President could alone negotiate, and under such circumstances could do so only under the handicap of a tremendous disadvantage. Certainly no intelligent student of constitutional law would contend that Congress could conduct or conclude such negotiation. As the repeal of no statute can affect vested rights acquired thereunder, so the repeal of no resolution declaring war, can relieve the Executive of the burden of negotiating and settling the final terms of peace.

It was to him that Spain and Germany turned when, weary of war, these nations in 1898 and 1918, asked for terms of armistice as preliminary to negotiation for peace. He, in the last instance, conferred not with Parliaments and Corps Legislatif, but with George and Clemenceau, alone empowered to speak for their respective nations upon the overshadowing subject.

The *impasse* between President Wilson and the Senate over the German Treaty has served to prolong unduly the interval between the armistice of November 11, 1918, and the formal re-establishment of peace between the United States and the Central Powers. The treaty, twice considered and twice rejected, leaves us precisely as though no covenant, other than the terms of the armistice, had been agreed to by the Executive. For this reason, the Congress, anxious to terminate the technical state of war still prevailing, determined to cut the knot if need be by a joint resolution repealing that of April 6, 1917. It was this resolution and its veto by the President, which challenged the attention of the country and still commands its interest.

Writers upon international law have long told us that foreign wars may be terminated and peace restored in three ways. First, by conquest, which presupposes the defeat or collapse of one of the belligerents.

Second, by mutual cessation or abandonment of hostilities long persisted in and generally followed by some agreement express or implied, for actual peace; and

Third, by agreement or treaty between the belligerents.

Under the terms of the armistice between the Allies and Germany, the final peace must be arrived at through negotiations and agreement. Under the Constitution, the President is invested with the treaty-making power, his agreements requiring the concurrence of two-thirds of the Senators present to make them effective. The Congress acted evidently upon the assumption that the Senate having failed to ratify, it became competent to make peace by joint resolution.

The Senate Committee on Foreign Relations substituted for the House Resolution one prepared by Senator Knox, consisting of four sections and an amended title, which reads as follows:

That the joint resolution of Congress passed April 6, 1917, declaring a state of war to exist between the Imperial German Government and the Government and people of the United States, and making provisions to prosecute the same, be, and the same is hereby, repealed, and said state of war is hereby declared at an end: *Provided, however,* That all property of the Imperial German Government, or its successor or successors, and of all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under control of the Government of the United States or of any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States and no disposition thereof made, except as shall specifically be hereafter provided by Congress, until such time as the German Government has, by treaty with the United States, ratification whereof is to be made by and with the advice and consent of the Senate, made suitable provisions for the satisfaction of all claims against the German Government of all persons, wheresoever domiciled, who owe permanent allegiance to the United States, whether such persons have suffered through the acts of the German Government or its agents since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, through the ownership of shares of stock in German, American, or other corporations, or otherwise, and until the German Government has given further undertakings and made provisions by treaty, to be ratified by and with the advice and consent of the Senate, for granting to persons owing permanent allegiance to the United States, most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce, and industrial property rights, and confirming to the United States all fines, forfeitures, penalties, and seizures imposed or made by the United States during the war, whether in respect to the property of the German Government or German na-

tionals, and waiving any pecuniary claim based on events which occurred at any time before the coming into force of such treaty, any existing treaty between the United States and Germany to the contrary notwithstanding. To these ends, and for the purpose of establishing fully friendly relations and commercial intercourse between the United States and Germany, the President is hereby requested immediately to open negotiations with the Government of Germany.

Sec. 2. That in the interpretation of any provision relating to the date of the termination of the present war or of the present or existing emergency in any acts of Congress, joint resolutions, or proclamations of the President containing provisions contingent upon the date of the termination of the war or of the present or existing emergency, the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war or of the present or existing emergency, notwithstanding any provision in any act of Congress or joint resolution providing any other mode of determining the date of the termination of the war or of the present or existing emergency.

Sec. 3. That until by treaty or act or joint resolution of Congress it shall be determined otherwise, the United States, although it has not ratified the treaty of Versailles, does not waive any of the rights, privileges, indemnities, reparations, or advantages to which it and its nationals have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof or which, under the treaty of Versailles, have been stipulated for its benefit as one of the principal allied and associated powers and to which it is entitled.

Sec. 4. That the joint resolution of Congress approved December 7, 1917, "declaring that a state of war exists between the Imperial and Royal Austro-Hungarian Government and the Government and people of the United States, and making provisions to prosecute the same," be, and the same is hereby, repealed, and said state of war is hereby declared at an end, and the President is hereby requested immediately to open negotiations with the successor or successors of said Government for the purpose of establishing fully friendly relations and commercial intercourse between the United States and the Governments and peoples of Austria and Hungary.

Amend the title so as to read as follows:

Repealing the joint resolution of April 6, 1917, declaring that a state of war exists between the United States and Germany, and the joint resolution of December 7, 1917, declaring that a state of war exists between the United States and the Austro-Hungarian Government.

Strike out the preamble.

Senator Knox, one of the greatest lawyers of his time, and easily the first lawyer on the Republican side of the Senate, prepared this resolution with great care, and defended it on the floor of the Senate on the fifth day of May last, in a speech of considerable length and of great erudition. His conclusions are:

First. "War is a state or condition of Governments contending by force," "a violent struggle through the application of armed force"—in other words war is actual hostilities.

Second. That it was so understood by our constitutional fathers, by the great Chief Justice, and by our War Department.

Third. That the power to declare war was exclusively in Congress, which created the status of war by a law which, like any other law, could be amended, modified, or repealed.

Fourth. That the purpose of the war powers of the Constitution was to give to the National Government the legal power and practical ability to conduct a successful war; that is, actual hostilities.

Fifth. That the war powers being given to enable the Government successfully to wage actual hostilities, the powers could not be exercised before a war was legally declared or *de facto* existing, nor after actual hostilities had ceased, and that the very fact of ending hostilities ended the war powers without any action whatever by Congress.

Sixth. That the powers of the President came from two sources, that of the Chief Executive, and that of Commander-in-Chief; that these two capacities were separate and distinct, wholly independent one from the other; that the powers of neither capacity could be invoked to augment the other; that he possessed no extraordinary powers as Chief Executive, save only and

to the extent such powers were conferred by statute, which to authorize action by him, must be duly and legally in operation.

It results from all of the foregoing facts and principles that the war has ended internationally, both as a matter of fact and of law; that domestically the war powers ceased with the end of actual hostilities; and that, therefore, we are already at peace, both internationally and domestically, without any further act by either the Executive or legislative branches of the Government.

It is difficult to condense without impairing the Senator's argument. It may be said, however, that its dominant note embodies the contention that the agreement of November 11, 1918, between Germany and the Allies was not an armistice but a capitulation; that it was not a truce but a termination of the war; that it was an end of the struggle by conquest. Hence all war powers of this nation became dormant again, and their continued exercise by the President since November 11th were usurpations; since, under the Constitution, they became effective with and during active hostilities only. This being true, a joint resolution repealing that of April 6, 1917, is not only proper but essential to restrain the Executive from assuming war powers in a time of actual peace.

It is obvious that such an attitude defeats the purpose for which it is assumed. If the armistice was a capitulation, if it imposed final terms upon the completely vanquished foe, accepted by that foe because helpless to reject them, it follows that there was subsequent need neither for a peace convention at Versailles, nor for a peace resolution at home. It follows, too, that all acts, whether legislative or administrative, involving the exercise of war powers subsequent to November 11, 1918, were unwarranted and illegal. But the Supreme Court of the United States has declared otherwise, and events the world over conspire to condemn the Senator's contention, which I do not think has been accepted anywhere. It was vigorously and I think effectively, assailed by Senator McCumber before the vote was taken upon the resolution. I think it perfectly proper to assume that the great Senator from Pennsylvania resorted to that line of argument because it presented the only basis upon which his resolutions could be sustained.

But the resolution itself refutes the contentions of its author and discloses its unavoidable intrusion upon the domain of the treaty-making power. The Senator, not content with a simple declaration of repeal, makes elaborate provision regarding property rights, losses, damage to person or property until treaty stipulations shall have been made with Germany concerning them and extending favored-nation treatment to America and waiving divers pecuniary claims against the United States, to obtain which the President is requested to open negotiations with the government of Germany.

It also stipulates that until by treaty or legislation it is otherwise determined, the United States, although it has not ratified the treaty does not waive any of its rights, privileges, indemnities, etc., to which it and its nationals have become entitled under the armistice or any extensions or modifications thereof or which have been stipulated for its benefit under the terms of the treaty itself.

These disingenous reservations were inserted in the resolution because without it the status of the United States and many of its nationals would have otherwise been seriously compromised by its passage. But with them the resolution at once assumes the form of a peace condition or covenant wholly foreign to the legislative authority of Congress and requiring both negotiation with and acceptance by Germany for its accomplishment. These stipulations and conditions were obviously essential to the national interest and to those of its citizens. Being essential, they were embodied in the resolution. But when so embodied the resolution ceased to be one of simple repeal and became instead a peace proposal to Germany dependent upon German assent for

its efficiency. Thus transformed, it passed from the jurisdiction of Congress to that of the Executive as the custodian of the treaty-making power.

It may be instructive to refer briefly to some of the complications which would beset us were we to make peace with Germany by Congressional resolution. Under the Alien Custodian Act, the government has seized and in many cases, sold alien property aggregating something like a thousand millions of dollars. It also seized all enemy shipping in our harbors when war was declared. This belongs to German nationals and involves many millions more. *E. converso,* Germany took over the property of American citizens within the empire when hostilities began, and must in the nature of things account for them, which presupposes an agreed procedure. The United States has in war always respected the ownership of property strictly private in character. Unless forfeited by crime or by offenses of the owner, it can be seized only by way of military necessity for the safety or other benefit of the army. If he has not fled, the commanding officer will give receipt for such property, which may enable the spoliated owner to obtain indemnity. The Hague Conference of 1907 duly ratified by the Senate in March following, specifically provides that the property of an enemy cannot be confiscated.

Under these conditions, the Knox or any other resolutions establishing peace without an agreement with Germany constitutionally negotiated, would not the United States and her citizens become liable under international law to Germany and to her citizens for all this property seized? And if so, to what extent or degree could the peace resolution be available as a defense to such claims? I do not know. I do not think anyone knows. But I do not believe it would constitute a reliable defense for this government should proceedings for the enforcement of Germany's claim be instituted in the Hague Tribunal or such Courts of International Justice as are now in contemplation. A bare repeal of the war resolution, therefore, which is admittedly within the powers of Congress, if approved by the President, would as regards claims and controversies growing out of the war, put us adrift upon unknown and uncharted seas.

My conclusions, reached with some reflection and stated with some hesitation, is that the Congress may, if it so chooses, repeal any previous resolution or act declaring war. But it must content itself with the act of repeal. It cannot without invading the treaty-making power, attach clauses or conditions to its act, to be accepted or considered by the enemy.

Instances are not entirely wanting of an assertion by Congress of the power to share the treaty-making power. One of them was successful in that it was accepted by the people as a *fait accompli.* I refer of course to the joint resolution regarding Texas. Under the administration of Mr. Tyler, a treaty was negotiated between the United States and the Republic of Texas under the terms of which the latter was to be admitted into the Union as one of its sovereign states. That treaty became the subject of a bitter and somewhat prolonged controversy, which resulted in its rejection by the Senate. The admission of Texas thereby became a paramount issue in the Presidential campaign of 1844, wherein Mr. Polk defeated Mr. Clay by a small popular majority. Mr. Polk, impelled by the dominant purpose and personality of Andrew Jackson, urged the acquisition of Texas and of Oregon up to the latitude of 54°—40″; a policy which successfully appealed to the national sentiment of the time. The result spurred the Administration of Mr. Tyler to a renewed effort for the immediate acquisition of Texas.

During its closing days, a series of joint resolutions, varying from each other in many essential details, but all aimed at the common purpose of admitting Texas, was introduced in both Houses. These culminated in the adoption of a joint resolution by a very considerable majority, which re-

ceived the approval of the President, the terms of which were formally accepted by the Republic of Texas which was thereupon received into the Union. The incident provoked one of the most interesting and exciting discussions of the Constitutional power of Congress to be found in the record of its proceedings. The opponents of the resolution contended, and I think unanswerably, that the admission of a foreign sovereignty in the American Union could be constitutionally accomplished only by a negotiated treaty, as had been recently attempted. Among their arguments was that under the Constitution, Senators must have been citizens for nine, and Representatives must have been citizens for seven years before the election; qualifications which could not, in the nature of things, attach to the residents and citizens of a distinct and separate sovereignty suddenly merging itself into that of the Union. It was, of course, contended by the proponents of the resolution, that the power to admit states being without limitation, applied alike to foreign and domestic communities and therefore was lawfully invoked under any circumstances and in any case when the admission of a proposed state was contemplated. But surely this clause must have been intended to apply to territories within and controlled by the United States.

Although the resolution actually accomplished the purpose, I am satisfied that it was *ultra vires*, a clear invasion of the treaty-making power by the Congress, and hence a violation of the organic charter. Von Holst, commenting upon the incident, stresses Calhoun's assertion in 1847, that he had taken this step because he was convinced that even then no annexation treaty would have received the assent of the Senate, and adds that

"the bridal dress in which Calhoun led the beloved of the Slavocracy to the Union was the torn and tattered Constitution."

The Texas incident offers the nearest approach to a precedent for the recent peace resolution that can be found; yet it is to be noted that no advocate or supporter of it made any reference to the fact. It was cited by opponents of the resolution, not as fortifying it, but as an unfortunate instance of party excess which contributed mightily to the anti-slavery sentiment and doubtless hastened that issue to its bloody crisis. We use it as a warning to be shunned, not as an example to be followed.

At the risk of lengthening this paper unduly, let me add that the examination of such a problem as this never fails to arouse my reverent regard for the wisdom and prescience of the framers of the American Constitution. They seem to have provided for almost every exigency which the events of the future might unfold, albeit some of them might appeal to other than constitutional methods of arbitration. They distributed its powers and balanced its limitations with a skill that shall ever bear testimony to their genius and their patriotism. They made possible the success of a unique experiment in popular government. Their work was by no means perfect, for time has suggested and their posterity have wrought great changes in their handicraft. Yet it fully merits the eloquent eulogium of Gladstone as the greatest scheme of government ever struck off at a given time by the hand of man.

Party politics beget antagonisms frequently acrimonious and sometimes virulent. Under the stress of controversy the best of men are sometimes prone to use their power in a manner and to a degree which their judgment in cooler hours of reflection will not approve. This was among the perils against which Washington solemnly warned his countrymen. Let us not, either now or hereafter, whatever the excitement or provocation, do or seek to do either for partisan or other advantage, that which under our Constitution may not be done at all, or must be done in some other way or through the agency of some other department. For an untoward and unjust procedure, however exigent or temporarily desirable, may, in the immortal words of

Henry Grattan, arise to sting us in the future. Whatever the emergency of the moment or the urge of controversial passion, whatever the apparent demands of an aroused constituency, impatient of delay and dreading the consequences of measured and orderly processes, tried out by experience and sanctioned by law, a wise and dispassionate statesmanship will adhere to the lines and precepts of the Constitution. The stately march of a people's government, dispensing even-handed justice, safeguarding life and property, vouchsafing ordered liberty to all men under the law, will continue through the years which lie beyond, only when the limitations upon public authority are at all times observed. If changes are demanded by the progress of events, let them be made in harmony with the methods which have been provided for their attainment and which have in the past proved ample for their purpose. Respect for the law and obedience to authority, are indispensable to the perpetuity of popular government. The decline of these public virtues is the greatest and most sinister evil of the hour. It signifies a diseased public sentiment, impatient of restraint and rebellious of majority rule. We who are temporarily entrusted with the powers of state may be in some degree responsible for the prevalence of this unfortunate evil. Let us not accentuate its development by supplying it with political examples. Conscious of the need at this time for holding the ship to its chartered course through an angry sea, let us rather adhere with undue persistence to both the form and the substance of constitutional procedure and shape our foreign relations to the scheme and structure of the organic law. The necessity for summary action, however insistent, will not assume the proportions of an overshadowing danger. The prevailing war status is technical only. Hostilities ceased long ago and peace, though not yet sanctioned by the formula of an international covenant, has in fact returned to our beloved country. We can for a while better endure the transient embarrassments of a suspended treaty, than seek to avoid them by resort to methods of doubtful authority.

CHARLES S. THOMAS.

Denver, Colo.

SHIPPING—PREPAID FREIGHT.

DORFF v. TAYA, et al.

Supreme Court, Appellate Division, First Department. December 3, 1920.

185 N. Y. Supp. 174.

Prepaid freight, in the absence of an agreement to the contrary, must be returned to the shipper, if the goods do not arrive.

PAGE, J. The action was to recover from the carrier prepaid freight. The complaint alleges the shipment of 500 bales of cotton from Wilmington, N. C., to Genoa, Italy, and the prepayment of freight charges, amounting to $22,116.96, by the steamship Guadalquiver, pursuant to a bill of lading issued by the master of said vessel, a copy of which is annexed to the complaint and made a part thereof; that the Guadalquiver was sunk in the high seas by an enemy submarine and the 500 bales of cotton were wholly lost; that the agreement to transport the said merchandise was not carried out, and the cotton was not delivered to the order of the shippers or their assigns, as provided in the bill of lading; demand and refusal of repayment of the prepaid freight. The answer sets up three separate defenses, to which the plaintiff demurred for insufficiency.

The court overruled the demurrers to the first and third and sustained the demurrer to the second, giving the plaintiff leave to withdraw the demurrers to the first and third defenses and to reply thereto. The demurrer to the first defense should have been sustained. The answer admits the issuance of the bill of lading and that the copy attached to the complaint is a correct copy.

It is sought to set up a prior contract of February 1st, for shipment of these goods, and that it was thereby agreed that the freight should be prepaid, and that the freight so prepaid should be retained by the defendant in any event, ship or goods lost or not lost, and that the shipment was to be made by Alexander

Sprunt & Son in accordance with the regular bill of lading of the defendant, which said bill of lading, as was known to the shippers, contained a provision that all freight should be prepaid and should be retained by the carrier in any event, ship or goods lost or not lost. It is then alleged that the shipment of the goods mentioned in the complaint was made, and the master of the ship issued bills of lading therefor, and the ship sailed and was sunk by an enemy submarine before her arrival. The defense further alleges an insurance of the goods, together with the prepaid freight; that after the loss of the ship the insurance company fully indemnified the holder of the bill of lading, and paid to the said holder all losses sustained, and an assignment to the insurance company of any and all rights and claims which he might have against these defendants.

In so far as the defense sets up the insurance and assignment to the insurance company, it is insufficient, as the complaint alleges such assignment and an assignment by the insurance company to plaintiff; that there has been a mesne assignment of a cause of action is not a defense, if the complaint alleges an assignment by the mesne assignee to the plaintiff prior to the commencement of the action.

In so far as the defense seeks to set up another agreement than that contained in the bill of lading, it is insufficient. It is not alleged that the provision in regard to the retention of prepaid freight was omitted by mistake or fraud, nor that the master did not have authority to issue the bill of lading that was issued. The law is well settled that the bill of lading is not a mere receipt for goods shipped, but is also the contract under which they are shipped, and that the terms thereof cannot be varied by extrinsic evidence of another prior contract in relation thereto. John Vittuci Co. v. Canadian Pac. Ry. Co. (D. C.), 238 Fed. 1005; Germania Fire Ins. Co. v. Memphis & Charlestown R. R. Co., 72 N. Y. 90, 93, 28 Am. Rep. 113; Hill v. Syr., Bing. & N. Y. R. R. Co., 73 N. Y. 351, 29 Am. Rep. 163. When we consider that this bill of lading was a negotiable bill, transferable by indorsement, the reason of the rule requiring the bill to be the final statement of the contract becomes evident.

The law is well settled in this country, contrary to the English cases, that prepaid freight, in the absence of an agreement to the contrary, must be returned to the shipper if the goods do not arrive. Nat. Steam Nav. Co. v. Int. Paper Co., 241 Fed. 861, 862, 154 C. C. A. 563, and cases cited; The Gracie D. Chambers, 253 Fed. 182, 183, 165 C. C. A. 82, affirmed 248 U. S. 387, 39 Sup. Ct. 149, 63 L. Ed. 318. Bills of lading are quite generally drawn with such a clause as the defendant sets forth incorporated therein. This is an important provision of the contract, and unless it is incorporated in the bill of lading its absence cannot be supplied by evidence of prior negotiations with reference thereto.

The order, in so far as appealed from, is reversed, with $10 costs and disbursements to appellant, and the demurrers to the first and third defenses are sustained, with $10 costs. All concur.

NOTE—*Duty of Carrier to Return Prepaid Freight if Not Delivered.*—Inferences from the American doctrine, as stated by the instant case, are that in an ordinary bill of lading, the carrier must return the goods on which freight has been prepaid, where there is failure to deliver and if the goods are lost, his general duty is to pay their value. But in England the rule is that the shipper cannot recover for the loss of the freight, that is to say, the goods, but by the shipment of freight prepaid, the shipper vests his interest in the goods, *pro tanto*, in the ship owner, who only has the right to sue for their loss. Nat. S. Nav. Co. v. International Paper Co., 241 Fed. 861, 154 C. C. A. 563. The English law, therefore, puts an end to all inquiry as to the cause of failure to deliver freight, but gives to the shipper the right to recover from the shipowner the value of the goods, he tracing action against whomsoever caused the loss.

In the case of the Gracie D. Chambers, 253 Fed. 182, 165 C. C. A. 82, the freight was not lost, but was not delivered and the action for return of the freight prepaid, as was held in Griggs v. Austin, 3 Pick (Mass.) 20, 15 Am. Dec. 175, was maintainable. And it was thought the intent was that the carrier should keep the freight, where he does not deliver the cargo, unless such failure is due to a peril not excepted in the bill of lading or charter party. The American rule applied in the Gracie D. Chambers case was held to deny recovery to the shipper where clearance was denied where an embargo prevented the vessel from going into the danger zone during the war. This ruling was affirmed in 248 U. S. 387, 63 L. ed. 318. Learned Hand, D. J., dissented, claiming that there was a frustration of the voyage *in limine* and there was unearned freight, a position which has much apparent merit.

The case of Ocean S. Co. v. U. S. Steel Products Co., 239 Fed. 823, 152 C. C. A. 609, holds, that a shipowner has no right to demand freight as earned, notwithstanding that bill of lading provides that the freight is to be considered as earned, and therefore libels for recovery of damage to goods were not maintainable where before the delivery of the bills of lading on which was stamped a statement that the goods had been received in good order, they were actually damaged by fire after loading.

This question seems to this annotator quite interesting, the English rule being very much harder than that applied under what is called the

American doctrine, a doctrine much more in accordance with the American method of doing business and more adaptable to the application of instructions where in truth and in fact exceptions embraced in shipping contracts relieving a vessel from liability may have their just and natural effect. Perils on ocean are somewhat different than those on shore and thereon are found hindrances to the completion of contracts which the jurisprudence of no particular country can provide against.

C.

CORRESPONDENCE.

VALIDITY OF WARRANT OF ATTORNEY TO CONFESS JUDGMENT.

Editor, Central Law Journal:

In your issue of December 17th, you have an article on the "Validity of Judgments Entered on Warrant of Attorney to Confess Judgment," and it may be of interest to your readers to know the Statutory law of Florida on the question.

Our law, Section 1606 of the General Statutes, which was an old Act, adopted originally in 1828, read as follows:

1606. Declaration of Invalidity.—All powers of Attorney for confessing or suffering judgment to pass by default or otherwise, and all general release of error, made or to be made by any person whatsoever with in this State, before such action brought, shall be absolutely null and void. (Nov. 23, 1828. Sec. 67.)

From the above, it will be seen that in this State at least, no warrant of attorney to confess judgment can be given in either a note, or any other kind of any instrument, until an action has been instituted thereon.

Yours truly,

WM. HUNTER.

Tampa, Fla.

BOOKS RECEIVED.

Income Tax Procedure. By Robert H. Montgomery, C. P. A., former president American Association of Public Accountants; Professor of Accounting at Columbia University. New York. 1921.

The Financial Organization of Society. By Harold G. Moulton, Associate Professor of Political Economy of the University of Chicago. 1921.

HUMOR OF THE LAW.

"And now, gentlemen," piped the orator, "I just wish to tax your memory." "Good heavens!" exclaimed one of the audience, "has it come to that?"—*London Tit-Bits.*

"Prisoner," said the judge, "you say your wife hit you on the head with a plate. Is that so?"

"Yes, sir," answered the prisoner.

"But," said the judge, "your head doesn't show marks of any kind."

"No, sir," answered the prisoner, with a touch of pride, "but you should have seen that plate!"

This is the secret, so they say,
Of care that life reveals.
One fellow does not know the way
The other fellow feels.
His harsh expressions make me fret.
I'm friendless and alone.
I wish the traffic cop would get
A flivver of his own.

—*Washington Star.*

Hemmandhaw—It was never a wise plan to act on the impulse of the moment.

Shimmerpate—I suppose you have an instance in mind.

"Yes; when I was running for office I punched the nose of a man who asked me if I had an ax to grind——"

"Well——"

"And then I discovered the poor gink was a traveling tinker who was earning his living with a grindstone."—*Youngstown Telegram.*

"Beg pardon, sir, but you have it in your power to do me a great favor and one that I will gladly repay," said a stranger who entered the business offices of a bankrupt.

"I? I am afraid you have made a mistake. I am of no use to anybody," said the bankrupt. "I have just failed for half a million, and with no assets."

"So I heard."

"You knew it, and yet you say I can be of service to you?"

"Yes, sir; I beg you will not refuse."

"But what can a miserable bankrupt like me do for anyone?"

"I want you to tell me, sir, how you got so much credit?"

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession**—Intention.—Intention to hold adversely is an indispensable element of adverse possession.—Moir v. Bailey, Ark., 225 S. W. 618.

2. **Animals**—Liability for Vicious Dog.—An owner of a vicious dog, who failed to kill it, though fully advised of its vicious propensities, was liable for death of a child bitten by it, though she would not have died if the dog had not been rabid, and though the owner had no knowledge of such condition.—Clinkenbeard v. Reinert, Mo., 225 S. W. 667.

3. **Automobile**—Dangerous Vehicle.—A motor vehicle operated on the public highways is a dangerous instrumentality, and the owner who intrusts it to another to operate is liable for injury caused to others by the negligence of the person to whom it is intrusted.—Southern Cotton Oil Co. v. Anderson, Fla., 86 So. 629.

4.——Negligence of Family.—The owner of an automobile kept for family purposes is liable for injuries inflicted upon a stranger as a result of the negligent driving of one of his children, where the car is occupied by members of the family and is being used for one of the purposes for which it is kept.—Stevens v. Luther, Neb., 180 N. W. 87.

5. **Bailment**—Conversion.—If a bailee accepts money and places it in a private safe mixed with his own money for deposit with his bankers upon his own private account, such treatment of the funds is a conversion, and renders the bailee absolutely liable, even though the money is stolen or embezzled without his fault.—Peltola v. Western Workman's Pub. Soc., Wash., 193 Pac. 691.

6.——Return of Property.—An essential element of any bailment is an expressed or implied agreement by the alleged bailee to return the property delivered to him.—Bradley v. Harper, Wis., 180 N. W. 130.

7. **Bills and Notes**—Burden of Proof.—In an action on notes, maker relying on fraud has burden of proving fraud.—Portuguese American Bank v. Schultz, Cal., 193 Pac. 806.

8.——Indorser's Contract.—Where the name of the indorser has been placed on the back of the instrument with a rubber stamp by one having authority to do it and with intent to indorse the instrument, it is a valid indorsement within the provision of sections 37 and 38 of the Negotiable Instrument Law (sections 6557, 6558, Gen. St. 1915).—State Savings Bank of Leavenworth v. Krug, Kan., 193 Pac. 899.

9.——Threat.—A note executed by a father to pay the debts of his son, under threats by the debtor that the son would be prosecuted for embezzlement unless the note was executed, and a promise not to prosecute if the note was executed, is such duress as would entitle the maker to avoid the payment thereof.—Pendleton v. Greever, Okla., 193 Pac. 885.

10. **Chattel Mortgages**—Automobile.—Where a chattel mortgage on an automobile was duly executed, filed, and registered, subsisting and unpaid when defendant made repairs on the automobile, and defendant had full notice thereof, the chattel mortgage was superior to the lien for work and materials furnished for repairs, whether defendant retained possession or not, and whether the repairs increased the value or not.—Holt v. Schwarz, Tex., 225 S. W. 856.

11. **Conspiracy**—Where One Acts.—If two or more enter into a conspiracy to do an unlawful act, and one of them thereafter, in pursuance of the common design, does the unlawful act all of the conspirators are guilty.—State v. Sheline, Mo., 225 S. W. 673.

12. **Constitutional Law**—Public Utility.—The state may direct a public utility to increase its rates above those fixed by franchise, if necessary, and, so far as the municipality is concerned, there is no constitutional objection on the ground of the impairment of contract obligation.—City of Richmond v. Chesapeake & Potomac Telephone Co., Va., 105 S. E. 127.

13. **Contracts**—Interpretation.—The first rule of interpretation of contracts is to give to the language employed by the parties the meaning they intended, and this meaning is to be derived from the language used, where that is clear and unambiguous.—Stoops v. Bank of Brinkley, Ark., 225 S .W. 593.

14.——Duress Invalidates.—The exercise of free will power of both contracting parties is essential to every contract.—Sylvan Mortgage Co. v. Stadler, N. Y., 185 N. Y. Sup. 293.

15. **Copyrights** — Monopoly. — A copyright, while possessing the same attributes of monopoly as a patent or trade-mark, differs from both of them in that it applies exclusively to works of art or literature.—Coca-Cola Co. v. State, Tex., 225 S. W. 791.

16. **Corporations**—Executing of Note.—The signature of a corporation to its promissory note was complete without the signature of any director.—Flick v. Jordan, Ind., 129 N. E. 42.

17.——Ultra Vires.—A contract of a coal corporation with its employees absolutely to furnish them medical attention at all times during service would not be ultra vires.—Virginia Iron, Coal & Coke Co. v. Odle's Adm'r, Va., 105 S. E. 107.

18. **Criminal Law**—Suspension of Judgment.—The effect of suspension of judgment of conviction, as by stay of execution granted by a District Court of Appeals, is that during the

time of the judgment's suspension defendant cannot be treated as a convict undergoing punishment for his crime, nor as one subject to imprisonment in the state prison, even for the purpose of detention.—Ex parte Mayen, Cal., 193 Pac. 813.

19. **Damages**—Earning Power.—In a personal injury action, where the injuries result in a diminution of earning power, the measure of damages is a sum equal to the present worth of such diminution, and not its aggregate for plaintiff's expectancy of life.—Hill v. Director General of Railroads, N. C., 105 S. E. 185.

20. **Deeds**—Reservation.—Where deed naming owner and woman with whom he was living, and whom he thought was his wife, as grantors, reserved life estate in grantors, a reservation of life estate in grantors was void as to the supposed wife, on owner's annulment of marriage on ground that she had other husband living, since the reservation was not to the woman personally, but to owner's wife.—Burleson v. Stewart, N. C., 105 S. E. 182.

21. **Descent and Distribution**—Privilege.—The right to succeed to property of a decedent is a privilege which is granted by the state on such terms as may be imposed, and it depends on the statute of wills and statutes of descent and distribution.—Cornett's Ex'rs v. Commonwealth, Va., 105 S. E. 230.

22. **Divorce**—Attorney Representing Both Parties.—A husband, who employs an attorney to foster the bringing of an action for divorce by his wife, and to represent him as well as her in such litigation, with instructions to do whatever is necessary to bring about a judgment for divorce, cannot be heard, after the rendition of such judgment, to attack its validity on the ground that public policy forbids an attorney to represent both parties to a divorce action.—Todd v. Rhodes, Kan., 193 Pac. 894.

23.——Property Interests.—The court has power in a divorce action to make disposition of community property, including the homestead, and on dissolution of the marital status by court decree, and assignment of the homestead therein, its character as such is destroyed.—Remley v. Remley, Cal., 193 Pac. 604.

24.——Remarriage.—Under Comp. St. 1910, § 3907, making all marriage contracts without the state which are valid by the laws of the state in which they were contracted valid within the state, a remarriage by a woman within one year after securing a divorce within the state, contracted outside the state and with a resident of the state, who had gone out of the state to evade the prohibition of section 3951 against such remarriage, is valid within the state, since the latter section does not make such marriage invalid, but merely imposes a punishment on the parties contracting it.—Hoagland v. Hoagland, Wyo., 193 Pac. 843.

25. **Easements**—Streets.—A person who sells lots with reference to a map showing streets, and those claiming under him, are estopped from denying the right of a purchaser, and those in privity with him, to use the streets as laid down in the map, and this dedication of an easement appurtenant to the land sold is irrevocable.—Eller v. Starr, N. C., 105 S. E. 167.

26. **Eminent Domain**—Warehouse.—The use of a warehouse on a right of way as a public potato warehouse is a public use; and the use proposed to be made of the defendant's right of way by the plaintiff is a public use.—Simmons v. Northern Pac. R. Co., Minn., 180 N. W. 114.

27. **Estates**—Rule in Shelley's Case.—However the rule in Shelley's Case may have originated, it is now firmly established in our jurisprudence and should remain so.—Blackledge v. Simmons, N. C., 105 N. E. 202.

28. **Execution**—Supplementary Proceedings.—A creditor is entitled to examine debtor on supplementary proceedings as to property situated in another state.—Watson v. Pryor, Cal., 193 Pac. 798.

29. **Executors and Administrators**—Individual Preferment.—Where administrator executed lease to stranger and thereafter took assignment from stranger, individually, he took lease for the benefit of the heirs.—Robinson v. Roinstad, S. D., 180 N. W. 67.

30. **False Pretenses**—What Constitutes.—To constitute false pretenses, there must be false representations as to existent facts false within the knowledge of the party making them, or made recklessly without belief or without any just reason to believe in their truth, calculated and intended to deceive, and which do deceive the person from whom the money or thing of value is taken, and reasonably relied upon by such person at the time of taking.—State v. McFarland, N. C., 105 S. E. 179.

31. **Fixtures**—Removal.—Generally, a term tenant cannot remove fixtures after the expiration of his term, and the landlord becomes the absolute owner on tenant's surrender of premises without removal of fixtures, since tenant by failing to remove fixtures abandons the right to so do.—Blake-McFall Co. v. Wilson, Ore., 193 Pac. 903.

32. **Fraud**—Damages.—All defendants who participated in a common plan to defraud a purchaser of land are liable for the same measure of damages, regardless of the part they took in carrying out the plan.—Booker v. Pelkey, Wis., 180 N. W. 132.

33. **Frauds, Statute of**—Performance.—Conceding that a contract of a deceased to pay for services was within the statute, the party performing the services was entitled to recover where there was full performance on his part, as neither law nor equity will permit statute to be used as an instrument of or a shield for fraud.—Keller v. Gerber, Cal., 193 Pac. 809.

34. **Fraudulent Conveyances**—Intent.—Notice that an action of debt was pending in county court against seller of land was not sufficient of itself to charge purchaser with notice of an intent on the part of the seller to defraud creditors.—Ford v. Honse, Tex., 225 S. W. 860.

35.——Preference.—An insolvent debtor's preference of his child is not fraudulent as a matter of law.—First Nat. Bank of Ashley v. Mensing, N. D., 180 N. W. 58.

36. **Gifts**—Intention.—Where the proof is clear of an intention to make an absolute gift inter vivos of a chose in action, arising from a debt not evidenced by a promissory note or other document, an unqualified direction by the donor to the debtor to pay the debt to the donee, instead of to the creditor, is a sufficient delivery of the gift; it being the only delivery of which the chose is susceptible.—Dinslage v. Stratman, Neb., 180 N. W. 81.

37.——Parol Gift.—A parol gift of land must be an absolute present gift, not a promise or the expectation of some future act, and donee must have taken possession in furtherance of the gift, must have made permanent and valuable improvements for which he cannot be compensated in damages, and must have changed his condition or circumstances and been induced to forego some benefit, or assume some liability upon the strength of the gift, in such manner that it would be inequitable not to enforce the gift.—Sturgis v. McElroy, Wash., 193 Pac. 719.

38. **Guardian and Ward**—Dependent Children.—There is a distinction between a dependent and a delinquent child, and where a children's home society was appointed a guardian of a dependent under Pub. Acts 1911, p. 166, the child on reaching 14 years of age could choose its own guardian subject to the approval of the court, under Acts 1909, p. 518.—Arkansas Children's Home Soc. v. Walker, Ark., 225 S. W. 616.

39. **Highways**—Knowledge of Defects.—Mere knowledge of defects in a public highway before using is not per se contributory negligence, but the traveler must use care to avoid known defects.—Straight Creek Fuel Co. v. Mullins, Ky., 225 S. W. 726.

40. **Homestead**—Oil Lease.—Under the Constitution, a so-called oil and gas lease, which was a mere contract of husband and wife to convey minerals in their land, held unenforceable as against their homestead.—Maynard v. Gilliam, Tex., 225 S. W. 818.

41. **Homicide**—Threats.—Only communicated threats by deceased against accused may be considered by the jury in determining whether accused had the right to act upon appearances; but uncommunicated as well as communicated threats may be considered in determining who

was the aggressor, and as tending to throw light on the conduct of deceased at the time of the encounter.—State v. Davis, Mo., 225 S. W. 707.

42. **Husband and Wife**—Antenuptial Contract.—An antenuptial agreement fixing the property rights of prospective spouses not unjust and inequitable should be liberally construed to effect the intention of the parties.—Comstock v. Comstock, Ark., 225 S. W. 621.

43. **Improvements**—Good Faith.—Under the common law, there was no right of recovery from the owner of land for improvements made in good faith under color of title; but the occupying claimant lost such improvements, though he acted in good faith and had color of title.—Thompson v. Illinois Cent. R. Co., Ind., 129 N. E. 55.

44. **Infants**—Emancipation.—The emancipation of a minor by his parents does not remove his disabilities or affect his right to disaffirm his contract; hence, in an action for disaffirmance of an infant's contract, the question of whether he has been emancipated is immaterial.—Mast v. Strahan, Tex., 225 S. W. 790.

45. **Injunction** — Trespass. — "Trespass" implies force and "fraud" includes acts involving a breach of duty, trust, or confidence injurious to another, or by which an undue and unconscientious advantage is taken of another, and implies a willful act whereby another is sought to be deprived of what he is entitled to either at law or in equity, so that a finding that defendants were unlawfully, fraudulently, and forcibly holding possession of plaintiff's premises as mere trespassers, authorizes a mandatory injunction to compel restoration of possession.—Hill v. Brown, Tex., 225 S. W. 780.

46. **Insurance**—Answers.—In the absence of a statute affecting the question, the answer of the insured to a question in the application as to insanity in his family will in Missouri be deemed a warranty.—Prentiss v. Illinois Life Ins. Co., Mo., 225 S. W. 695.

47.——Mortgage.—A provision in a fire policy that, whenever the insurer should pay mortgagee for loss under policy and should claim that as to the mortgagor or owner no liability existed, insurer should to that extent be legally subrogated to the rights of the parties to whom the payment was made under all securities held as collateral to the debt or might at its option pay the mortgagee the whole principal due and receive a full assignment and transfer of the mortgage and securities, held enforceable.—Mosby v. Aetna Ins. Co., Mo., 225 S. W. 715.

48. **Judges**—Election of Successor.—That the Governor, after having filled a vacancy in the office of circuit judge, refuses to call a special election to fill the vacancy, does not invalidate an election of a candidate for such office at the next general election, though no proclamation or special notice is given of such election.—Means v. Terral, Ark., 225 S. W. 601.

49. **Judgment** — Non-Resident Defendant.—Judgment cannot be entered in favor of a non-resident defendant who has not been served with process.—Fleming v. Stringer, Tex., 225 S. W. 801.

50.——Priority.—The rights of the beneficiary of a trust are superior to those of a judgment creditor of the trustee, though the trustee did not quit-claim the lands to him until after judgment.—Bryan v. McCaskill, Mo., 226 S. W. 682.

51. **Landlord and Tenant.**—Attorn.—To "attorn" means to agree to become tenant to one as owner or landlord of an estate previously held of another, or to agree to recognize a new owner of a property or estate and promise payment of rent to him.—Obermeier v. Mattison, Ore., 193 Pac. 915.

52.——Possession.—Where a landlord failed to deliver possession of a portion of the premises, as he agreed to do, the tenant having entered into possession on such promise, there was an eviction, and as there can be no apportionment of the landlord's wrong, there can be no recovery of rent; the tenant in proceedings for rent not being restricted to the defense of set-off by way of counterclaim.—Econopouly v. Hamerman, N. Y., 185 N. Y. Sup. 291.

53. **Life Estates**—Outstanding Title.—Where a life tenant purchased an outstanding tax title to the premises after the time for redemption from the tax sale had expired, he is presumed to have purchased it for the benefit of the entire estate, including his life iterest and the interest of the remainder-man.—Peterson v. Larson, Mo., 225 S. W. 704.

54. **Malicious Prosecution**—Probable Cause.—Such facts and circumstances as would lead an unprejudiced person of ordinary prudence and intelligence to believe that accused is guilty of a crime which someone has in fact committed constitute probable cause for a criminal prosecution.—McHugh v. Ridgell, Neb., 180 N. W. 75.

55. **Master and Servant**—Independent Contractor.—Where a contractor agreed to assume all liability for injuries to himself and his workmen doing the work, but the owner of the property refused to permit the work to be done in the manner selected by the contractor, and required the work to be done in a manner specially directed, and with a rope furnished by the owner, the relation of owner and independent contractor was changed to that of master and servant, so that the owner is liable for injuries to the contractor, received because of the defective condition of the rope.—Gammage v. International Agricultural Corporation, U. S. C. C. A., 268 Fed. 246.

56.——Invitee.—Where an owner of a team employs a servant to haul wood, and the servant, in violation of the owner's orders, invites a boy to ride with him, and the boy is killed, the acts of the servant in the management of the team are the acts of the owner, and the owner is liable for the boy's death, if ordinary care on the servant's part after knowing of the boy's danger would have prevented the accident.—Sanborn v. Merriman, N. H., 111 Atl. 751.

57.——Safe Place.—The master is required to furnish tools, machinery, and implements suitable for the work to be done, and to provide a reasonably safe place and proper rules and methods for doing it.—Hensley v. Western Carolina Lumber Co., N. C., 105 S. E. 174.

58.——Scope of Employment.—Where a chauffeur, under order of his master to transport another servant to a certain place on a visit and bring her back, reached the place at 3 o'clock and called for her at 5 o'clock, the master was not liable for injuries caused by negligence of the chauffeur in the interim, while he was joyriding with a friend, and was neither going for nor returning with his passenger.—Kidd v. De Witt, Va., 105 S. E. 124.

59.——Sharing Profits.—An employee, who entered the employment of a company which had posted a notice of sharing profits with its employees, after the superintendent had stated it was the company's policy to distribute profits to employees, and who accepted a daily wage much less than the current wage for similar work in the community in reliance on the expectation of sharing in the profits, has an implied contract which entitles him to participate in the profits to the extent his wages earned justified under the method of the computation established by the posted notice.—Orton & Steinbrenner Co. v. Miltonberger, Ind., 129 N. E. 47.

60. **Mechanics' Liens**—Several Tracts of Land.—One general lien statement cannot be made to cover several separate noncontiguous tracts of land for material furnished in the improvement thereof, though each tract be owned by the same person, to whom the material was furnished, where no attempt is made therein to apportion or specify the amount or value of the material furnished as to each.—Bowman Lumber Co. v. Piersol, Minn., 180 N. W. 106.

61. **Mines and Minerals**—Time Essence of Contract.—Time is of the essence of contracts for the sale of mineral leases and lands.—Langford v. Bivins, Tex., 225 S. W. 867.

62. **Negligence**—Attractive Nuisance.—Where premises are habitually used as playgrounds with the owner's tacit consent, he will be charged with reasonably anticipating that they may be injured by some dangerous object on the premises which may not be attractive or enticing in itself.—Union Light, Heat & Power Co. v. Lunsford, Ky., 225 S. W. 741.

63.——Willfulness.—Negligence and willfulness are incompatible, and the former cannot

be of such degree as to become the latter, as acts to constitute willfulness must not be mere acts of nonfeasance, but must be acts of aggressive wrong.—Stauffer v. Schlegel, Ind., 128 N. E. 44.

64. **Parent and Child**—Support.—The parental duty to support children is not transferable except by adoption proceedings.—Ex parte Kirschner, N. J., 111 Atl. 737.

65. **Partition**—Improvements.—When one tenant in common makes improvements upon the common property without the consent of the other cotenants, he can claim reimbursement only to the extent the value of the land is enhanced by the improvement at the time of the partition.—Pynes v. Pynes, Tex., 225 S. W. 777.

66. **Partnership**—Chattel Mortgage.—Where a partnership had not adopted a firm name, the managing partner, who had authority to transact the business for the firm, could execute a chattel mortgage of the firm property to secure a firm debt in any name he chose to adopt, including his individual name, and such mortgage would bind the other partner.—Aramburn v. Guerricagoitia, Ore., 193 Pac. 922.

67.——Garnishment.—A partnership fund is not subject to garnishment for the individual debt of a member of the firm, especially where the firm's assets are insufficient to satisfy its debts.—Brown v. Cassidy-Southwestern Commission Co., Tex., 225 S. W. 833.

68.——Liability.—In an action against stockholders of a supposed corporation, where for failure to comply with the statute as to the incorporation the statute imposes a liability as "members of a general partnership," and the action against the defendants is "as individuals and as copartners," but some of the defendants are not jointly liable with the others, a joint judgment against them all is erroneous.—Graham v. Sewell, Fla., 86 So. 639.

69. **Patents**—Common Expedients.—The mere adoption of common expedients in adapting an existing machine to a new use is nevertheless invention, where the thought of the adaptation is new.—Cincinnati Milling Mach. Co. v. Oakley Mach. Tool Co., U. S. D. C., 268 Fed. 257.

70. **Principal and Agent**—Authority.—In order to hold a principal liable for money loaned or advanced to its agent, it must appear that the agent had authority to borrow for its principal, by showing that the agent had express authority, or that authority arises by necessary implication from the nature of the duties of the agent, or that the principal by his acts had brought the same within the apparent authority of the agent, or that the borrowing of money by the agent had been ratified by the principal.—Madill Oil & Cotton Co. v. City Nat. Bank, Okla., 193 Pac. 878.

71.——Joint Tortfeasors.—Where a suit is not based on contract, but is one in tort for deceit on account of material facts knowingly made by an authorized agent on behalf of his principal to defraud plaintiff, both the principal and the agent may be joined in one action.—Commercial City Bank v. Mitchell, Ga., 105 S. E. 57.

72.——Liability of Agent.—If the nature and circumstances of the transaction show that the intention was to bind the principal and not the agent, effect will be given thereto, though the agent signs his own name.—Allen v. Montgomery, Ga., 105 S. E. 33.

73.——Revocation.—"Where an agent is vested with a mere naked authority, not coupled with an interest, his principal may revoke that authority before performance; but, if the agent has rendered services and incurred expense in the course of his employment before his authority was canceled, the principal will be liable therefor, unless it is otherwise provided by the terms of their agreement." Hallstead v. Perrigo, 87 Neb. 128, 126 N. W. 1078.—Staats v. Mangelsen, Neb., 180 N. W. 78.

74. **Railroads**—Look and Listen.—Failure to look and listen at a railroad crossing may be treated as conclusively showing contributory negligence when the undisputed facts show that the failure to use such precaution was an inexcusable act of carelessness of which no person of ordinary prudence would have been guilty.—Hines v. Arrant, Tex., 225 S. W. 767.

75. **Religious Societies**—Factional Dispute.—Courts may properly assume jurisdiction of a dispute between different factions of church organization where property rights are involved, and in the exercise of such jurisdiction a chancery court will restore the possession of church property to the duly constituted church authorities, and will restrain those who are in rebellion to the constituted authorities from using it.—Morris v. Griffin, Ark., 225 S. W. 634.

76. **Remainders**—Merger.—Life estate is not merged in the remainder by a lease to the remainderman's husband for and during the life of the life tenant.—McCullough v. Carpenter, Mo., 225 S. W. 674.

77. **Sales**—Implied Warranty.—There is no distinction between an implied warranty of quality of goods sold and an implied warranty of fitness for a particular purpose, since the fitness of an article for the intended purpose depends on its possessing particular qualities.—Michigan Pipe Co. v. Sullivan County Water Co., Ind., 129 N. E. 5.

78.——Rescission.—Where the check given by a buyer for initial payment on account of contract for the purchase of grapes was dishonored although it had been represented to be good, the act of the seller in rescinding the contract cannot be held fraudulent merely because the grapes meantime advanced in price.—Demateis v. Vezu, Cal., 193 Pac. 793.

79. **Trade Marks and Trade Names**—Must Owner Be Manufacturer?—An article need not be actually manufactured by the owner of the trade-mark, it being enough that it is manufactured under his supervision and according to his directions, thus securing both the right of the owner and the right of the public.—Coca-Cola Co. v. State, Tex., 225 S. W. 791.

80.——Priority.—The right to a trade-mark or trade-name is determined by priority of adoption and use. Once acquired as appertaining to a certain class of goods, the right of priority extends to all goods of the same general class. A merchant operating a department store may use its trade-mark and name in the sale of all merchandise reasonably incident to the conduct of a department store. If a line of groceries is taken on, the mark and name may be used in connection with that department.—Citizens' Wholesale Supply Co. v. Golden Rule, Minn., 180 N. W. 95.

81. **Vendor and Purchaser**—Forgery.—Deed in which the name of the grantee was altered after delivery being void as a forgery, purchasers from the grantee named after the forgery acquire no rights to the property, though they were innocent of the forgery and had no notice thereof.—Lowther Oil & Gas Co. v. McGuire, Ky., 225 S. W. 718.

82. **War**—Extent of War Powers.—Federal legislation under the war power only goes to necessities of the war, and not to internal affairs of the several states in times of peace.—Public Service Commission, Second Dist., v. New York Cent. R. Co., N. Y., 185 N. Y. Sup. 269.

83. **Wills**—Personal Property.—Since title to personal property passes to the personal representative of a decedent, a legatee cannot maintain an action at law against a third person to recover the property bequeathed, not withstanding that the estate has no debts.—Strader v. Metropolitan Life Ins. Co., Ga., 105 S. E. 74.

84.——Sound Mind.—In order to make a valid will, testator must not only understand that he is making a will, but he must have mind and memory sound enough to appreciate the business in which he is engaged; he must comprehend what property he has to dispose of, and the natural objects of his bounty, and understand the nature of his act and the effect of his will.—Donovan v. St. Joseph's Home, Ill., 129 N. E. 1.

85.——Unnatural Disposition.—Unnatural or unreasonable provisions of the will, standing alone, will not support a finding of testamentary incapacity, but in passing upon the question of testamentary capacity, the unreasonableness or unnaturalness of the will is one of the elements to be considered by the jury in connection with all the other evidence in the case.—Scally v. Wardlaw, Miss., 86 So. 625.